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In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 14

ROBERT M. WIEMAN *et al.*,

Appellants,

VERSUS

PAUL W. UPDEGRAFF *et al.*,

Appellees.

BRIEF OF APPELLEES, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA

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OCTOBER, 1952.

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Section 10, Article 1 of the Constitution of the United States. This being true it would likewise appear, *under the principles of law announced in the Garner case, supra*, that inasmuch as it has been unlawful since 1941 for a public officer (not an employee) of this State to be affiliated with one or more of the designated organizations referred to in Section 31, or to advocate, etc., the doctrines enumerated in said section, the provisions of the instant Act, *insofar as same relate to like affiliations or doctrines of such officers during the past five years*, are not invalid under the above constitutional provisions.

"Before concluding our reference herein to the decision in the *Garner case*, attention is called to the fact that the ordinance there involved did not provide (as does the instant Act) for an *automatic forfeiture* of position and compensation for failure to take the oath, since said decision recites that the employees involved in said case

> 'were discharged for such cause after administrative hearing, * * *.'

"*Under the Act involved in this appeal each public officer and employee of Oklahoma is under the burden of making his own decision as to whether he can honorably take the oath in order to prevent his position and compensation from being automatically forfeited.* Therefore, that part of the decision of the *Garner case* which states

> 'We have no reason to suppose that the oath *is or will be construed by the City of Los Angeles* or by California courts as affecting adversely those persons who during their affiliations with a proscribed organization were innocent of its purpose, or those who severed their relations with any such organization when its character became apparent, or those who were affiliated with organizations which at one time or

another during the period covered by the ordinance were engaged in proscribed activity but not at the time of affiant's affiliation. We assume that scienter is implicit in each clause of the oath. As the city has done nothing to negative this interpretation, *we take for granted that the ordinance will be so read to avoid raising difficult constitutional problems which any other application would present.* Fox v. Washington, 236 U.S. 273, 277 (1915). It appears from correspondence of record between the city and petitioners that although the city welcomed inquiry as to its construction of the oath, *the interpretation upon which we have proceeded may not have been explicitly called to the attention of petitioners before their refusal.* We assume that if our interpretation of the oath is correct the City of Los Angeles *will give those petitioners who heretofore refused to take the oath,* an opportunity to take it as interpreted and resume their employment.',

is not applicable to the instant proposition, since there is no *administrative body* created or authorized by House Bill No. 8:

(1) to give an Oklahoma officer or employee an 'administrative hearing,'

(2) to advise him as to his oath obligation and/or

(3) to give an officer or employee who fails to timely take the oath 'an opportunity to take it *as interpreted* and resume his employment.'

* * * * *

"It will be noted that the *Garner case, supra,* cites with approval the decisions of the United States Supreme Court in the *Lovett* and *Cummings cases.*

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In The
Supreme Court of the United States

OCTOBER TERM, 1952

No. 14

ROBERT M. WIEMAN; NANCY KENT ZIEBUR; WERNER C. BAUM; SAMUEL HUNT LEE, JR.; MALCOLM CORRELL; LILLIAN A. SCHMOE, and LUELLA NIETZ,

Appellants,

VERSUS

PAUL W. UPDEGRAFF; THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, State Treasurer of the State of Oklahoma, and WILBURN C. CARTWRIGHT, State Auditor of the State of Oklahoma,

Appellees.

BRIEF OF APPELLEES, THE BOARD OF REGENTS OF THE OKLAHOMA AGRICULTURAL COLLEGES; A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA, AND WILBURN C. CARTWRIGHT, STATE AUDITOR OF THE STATE OF OKLAHOMA

STATEMENT OF CASE

The material allegations of fact set forth in the "Statement of the Case" on pages 9 to 21 of appellants'

brief, also in the preceding subheads of said brief entitled "Opinion Below," "Jurisdiction," and "Statutes Involved," are substantially correct, with the exception it is not stated that in response to the "Cross-Petition of Intervenors" (R. 32, 33), referred to on page 12 of appellants' brief (asking for a writ of mandamus or an order of mandatory injunction directing The Board of Regents of the Oklahoma Agricultural Colleges, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and Wilburn C. Cartwright, State Auditor of the State of Oklahoma, *hereinafter referred to as The Board of Regents, et al.*, to "certify, approve and pay" intervenors' salaries up to and including June 30, 1951), said The Board of Regents, *et al.*, filed their "Answer to Cross-Petition of Intervenors" (R. 35, 36), in effect alleging that the issuance of such a writ or order was neither necessary nor authorized since it was their intention to "certify, approve and pay" said salaries "unless enjoined" from doing so by the trial court.

Before concluding this statement, the appellees, The Board of Regents, *et al.*, desire to state that *the reason they did not appeal to this Court* the decision (R. 59-69) of the Supreme Court of Oklahoma herein (wherein certain holdings are made *adverse* to the position urged by The Board of Regents, *et al.*, both before the trial court and on appeal before the Supreme Court of Oklahoma), is that *it has been the policy of the Attorney*

General for many years to not appeal decisions of the Supreme Court of Oklahoma in cases which said office had appealed from trial courts to said court, even though he did not agree therewith.

However, since the appellants herein (intervenors in the trial court) have appealed the instant decision of the Supreme Court of Oklahoma to this Court, *made The Board of Regents, et al., appellees therein and served copies of the record and their brief thereon.* said appellees, under the duty to file an answer brief imposed thereon by Paragraph 4, Rule 27 of this Court and since our view as to the essential legal conclusions reached in appellants' brief is not in conflict therewith, file this brief wherein we quote for the information of the Court, *without further comment or argument*, applicable excerpts from the said brief of The Board of Regents, *et al.*, in the Supreme Court of Oklahoma, revealing the view we expressed in said court (same being in accord with our present view) *as to the issues that are now pending herein before this Court.*

Inasmuch as in certain of said "applicable excerpts" reference is made to an opinion of the Attorney General of Oklahoma, we deem it necessary to inform the Court that shortly after April 9, 1951, the effective date of House Bill No. 8 (the act involved here), the Attorney General of Oklahoma, at the written request of the Honorable Johnston Murray, Governor of Oklahoma,

addressed an opinion to the Governor in which he gave his opinion *in eleven numbered propositions*, as to all questions theretofore submitted to him as to the meaning and constitutional application of said act. It is to said opinion that said applicable excerpts refer.

ARGUMENT AND AUTHORITIES

Appellants in their brief in this Court set forth argument (Br. 44-108) in support of their instant appeal under what are designated as "Point I", "Point II", "Point III", "Point IV", "Point V" and "Point VI". Said points will be quoted and answered in this brief in the manner heretofore outlined.

ANSWER TO APPELLANTS' POINT I

Appellants' Point I (Br. 44-55) is set forth on page 44 of their brief as follows:

> "The Act inflicting punishment of forfeiture of contract and denial of compensation without judicial trial, is a bill of attainder, in violation of Article 1, Section 10 of the Constitution of the United States providing that no State shall pass a bill of attainder."

Said point is discussed in "Proposition 12" (pp. 48-59) of the brief of The Board of Regents, *et al.*, in the Supreme Court of Oklahoma, as follows:

> "Do provisions of Act violate that part of Section 15, Article 2 of our State Constitution, and Section 10, Article 1 of the Fed-

eral Constitution, which provide that no 'bill of attainder' or *'ex post facto* law' shall ever be passed?

"The above proposition is not discussed in the Attorney General's opinion. Plaintiff, however, at the trial took the position that said proposition should be answered in the negative, although many citizens of the State, *including intervenors*, take a *contra* view. In this connection attention is called to that part of the oath which requires each public officer or employee, *in order to prevent his office or employment and resulting compensation and expenses from being automatically forfeited*, to swear within the pertinent thirty-day period set forth in the Act

> 'that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member * * * of any agency, party, organization, association, or group whatever *which has been* officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization.'

"It will be here noted * * * that under the above provisions of the Act if a citizen of this State who (for example) was holding a public office or employment on April 9, 1951 (the effective date of the Act), had at any time within five years *prior to said date* been a member of any organization which had been officially determined by the United States Attorney General to be a 'Communist Front or Subversive Organization,' *even though said citizen had not only ceased to be such a member long prior to said determination but had openly renounced and denounced the same*, said citizen would be unable to properly take said oath within thirty days after April 9, 1951, *supra*, and hence at the expiration of said period would not only *automatically forfeit* his

office or employment but his right to receive compensation and expenses thereafter. The same will be true as to all officers or employees elected or appointed after said date.

"It, therefore, appears that the Act (except as hereinafter noted in our discussion of the *Garner case)* is violative of that part of Section 15, Article 2 of our State Constitution, and Section 10, Article 1 of the Federal Constitution, which provides that no 'bill of attainder' or '*ex post facto* law' shall ever be passed. In this connection attention is called to the case of *American Communications Association* v. *Douds*, 339 U.S. 382, 94 L. ed. 925, wherein the United States Supreme Court, at page 952 of said Law Edition citation, held as follows:

> 'The unions' argument as to bill of attainder cites the familiar cases, *United States* v. *Lovett*, 328 U.S. 303, 90 L. ed. 1252, 66 S. Ct. 1073 (1946): *Ex parte Garland* (U.S.), 4 Wall. 333, 18 L. ed. 366 (1866): *Cummings* v. *Missouri* (U. S.), 4 Wall. 277, 18 L. ed. 356 (1866). Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. *But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for past actions;* whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into future conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be: but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.

> 'This distinction is emphasized by the fact that members of those groups identified in § 9 (h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in § 9 (h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. See United States v. Lovett, supra (328 U.S. at p. 314, 90 L. ed. 1258, 66 S. Ct. 1073); Cummings v. Missouri, supra (U.S.), 4 Wall. at p. 287, 18 L. ed. 356. Here the intention is to forestall future dangerous Acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder.'

"The above decision supports defendants' position here, since the instant Act clearly negatives the right of a public officer or employee who had been, within the preceding five years,

> 'a member of any agency, * * * which has been officially determined by the United States Attorney General, or other authorized public agency of the United States to be a communist front or subversive organization.',

to properly take the oath, even though he was no longer a member thereof.

"The principles of law announced in said decision, as defendants interpret same, are not departed from

by the Supreme Court of the United States in the recent case of *Garner et al.* v. *Board of Public Works of the City of Los Angeles et al.* (decided June 4, 1951—not officially reported). In said case attention is called to the 1941 California Act which amended the charter of the City of Los Angeles. The provisions of said amendment, *which are similar in many respects to the provisions of the instant Act*, are as follows:

> 'no person shall hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles, in any office or department thereof, either elective or appointive * * *, who is now or has been within five (5) years prior to the effective date of this section, or who may, after this section becomes effective, become *a member of or affiliated with* any group, society, association, organization or party which advises, advocates or teaches, or has, within said period of five (5) years, advised, advocated or taught the overthrow by force or violence of the Government of the United States of America or of the State of California.'

"It will be noted that said 1941 Act *did not require any oath* to be taken by officers or employees coming within the purview thereof. However, in 1948, an ordinance requiring an oath was adopted by said city, the material part of which is as follows:

> 'I further swear (or affirm) that I * * * within the period beginning five (5) years prior to the effective date of the ordinance * * * have not * * * been or become *a member of or affiliated* with any group, society, association, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other

unlawful means of the Government of the United States, or of the State of California.'

"It will also be noted that the five-year period mentioned in said city ordinance did not begin until two years after the effective date of said 1941 legislative Act. Therefore, if any person became a member of or affiliated with an organization, such as is referred to in said 1948 ordinance, he did so with full knowledge of the provisions of said Act, same being *by operation of law* incorporated into his election or appointment to public office or employment.

"In this connection the court held:

'The Charter amendment defined standards of eligibility for employees and specifically denied city employment to those persons *who thereafter* should not comply with these standards. While the amendment deprived no one of employment with or without trial, yet from its effective date it terminated any privilege to work for the city in the case of persons *who thereafter* engaged in the activity proscribed.

'The ordinance provided for *administration implementation* of the provisions of the Charter amendment. The oath imposed by the ordinance proscribed to employees activity which had been *denied them* in identical terms and with identical sanctions in the Charter provisions effective in 1941. *The five-year period provided by the oath extended back only to 1943.*

'The ordinance would be *ex post facto* if it imposed punishment for *past conduct lawful at the time it was engaged in.* Passing for the moment the question whether separation of petitioners from their employment must be considered as punishment, the ordinance clearly is not *ex post facto. The*

> *activity covered by the oath had been proscribed by the Charter* in the same terms, for the same purpose, and to the same effect *over seven years before*, and two years prior to the period embraced in the oath. *Not the law but the fact was posterior.*
>
> 'Bills of attainder are "legislative Acts * * * that apply either to named individuals *or to easily ascertainable members of a group* in such a way as to inflict punishment on them without a judicial trial * * *" *United States* v. *Lovett*, 328 U.S. 303, 315 (1946). Punishment is a prerequisite. See concurring opinion in *Lovett, supra*, at 318, 324. *Whether legislative action curtailing a privilege previously enjoyed amounts to punishment depends upon "the circumstances attending and the causes of the deprivation."* *Cummings* v. *Missouri*, 4 Wall. 277, 320 (1867). We are unable to conclude that punishment is imposed by a *general regulation* which merely provides standards of qualification and eligibility for employment.'

"The 'circumstances attending and the causes of the deprivation,' above referred to, which the court indicated prevented the 1948 ordinance from being invalid, was the fact that the five-year provisions of the oath required by said ordinance *did not antedate* the like provisions of the 1941 Act (charter amendment), and that a person taking the oath was only in effect required to swear that he had not violated the *general regulatory* provisions of an Act which was in existence at least seven years prior to the adoption of said ordinance.

"The above decision, by necessary implication, supports defendants' position here, *since there was no law in existence at any time during the five-year period referred to in the instant Act* which by 'gen-

eral regulation' or otherwise made it unlawful for a public officer or employee of this State to be a member of an agency or organization which had been declared by the United States Attorney General, etc., to be a 'communist front or subversive organization.'

"In this connection, however, attention is called to the fact that while 51 O.S. 1941, § 32 (as amended in 1945) was repealed by Section 8 of the instant Act * * *, *51 O.S. 1941, §§ 31, 33 and 34 were not repealed* (Sections 31, 32, 33 and 34 were originally enacted as Chapter 1, Title 51, page 209, Oklahoma Session Laws 1941) *and are still in full force.* Section 31, in effect, makes a person ineligible

> 'by election or appointment, to hold any State, county, school district or municipal *office in this State,*'

if at the time of his election or appointment he was affiliated with certain *designated* organizations, etc., or was advocating, etc., certain *designated* subversive doctrines; Section 33 provides for the removal by *court action* of State, county, school district and municipal officers who at the time of the filing of the action were so affiliated or advocating, etc.; and Section 34 makes it the duty of public officers having authority to appoint persons to fill State, county, school district or municipal office, to ascertain before making an appointment whether the prospective appointee is such a member or so advocates, etc., and if so, to not appoint the same.

"Inasmuch as the above abstracted sections of said 1941 Act are not based on *automatic forfeitures* predicated on *past* affiliations or activities nor to *undesignated* organizations, and since said sections do not apply to definite contracts of public *employees* lawful when entered into, it would appear that same are not invalid under the provisions of Section 15, Article 2 of our State Constitution or

Since the *Lovett case* (decided in 1946) cites the *Cummings case* with approval, we quote (for the information of the court) from the *Lovett case*, as follows:

> "We hold that § 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that "No Bill of Attainder or *Ex Post Facto* Law shall be passed." In *Cummings v. Missouri*, 4 Wall. (U.S.) 277, 323, 18 L. ed. 356, 363, this Court said, "A bill of attainder is a legislative Act *which inflicts punishment without a judicial trial*. If the punishment be less than death, the Act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *The Cummings decision involved a provision of the Missouri Reconstruction Constitution which required persons to take an Oath of Loyalty as a prerequisite to practicing a profession.* Cummings, Catholic Priest, was convicted for teaching and preaching as a minister without taking the oath. The oath required an applicant to affirm that he had never given aid or comfort to persons engaged in hostility to the United States and had never "*been a member of or connected with any order, society, or organization inimical* to the Government of the United States * * *." In an illuminating opinion which gave the historical background of the constitutional prohibition against bills of attainder, *this Court invalidated the Missouri constitutional provision both because it constituted a bill of attainder and because it had an ex post facto operation.* On the same day the *Cummings case* was decided, the court, in *Ex parte Garland*, 4 Wall. (U.S.) 333, 18 L. ed.

366, also held invalid on the same grounds an Act of Congress *which required attorneys practicing before this Court to take a similar oath.* Neither of these cases has ever been overruled. They stand for the proposition that legislative Acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group *in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.* Adherence to this principle requires invalidation of § 304. We do adhere to it.

'Section 304 was designed to apply to particular individuals. Just as the statute in the two cases mentioned it "operates as a legislative decree of perpetual exclusion" from a chosen vocation. *This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type.* It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U.S.C.A., § 2, 7 F.C.A., Title 18, § 2; acceptance of bribes by members of Congress, 18 U.S.C.A., §§ 199, 202, 203, 7 F.C.A., Title 18, §§ 202, 203; or by other government officials, 18 U.S.C.A., § 207; and interference with elections by Army and Navy officers, 18 U.S.C.A., § 59, 7 F.C.A., Title 18, § 59.

'Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act *specifically cutting off the pay of certain named individuals found guilty of disloyalty,* makes it no less galling or effective than if it had been done by

an Act which designated the conduct as criminal.' "

ANSWER TO APPELLANTS' POINTS II, V AND VI

Appellants' Point II (Br. 55-66) is set forth on page 55 of their brief, as follows:

> "The forfeiture of appellants' contracts and the denial of accrued compensation thereunder for failure to take the Oath, denies appellants liberty and property without due process of law, because certain requirements of the Oath bear no reasonable relation to the purpose of the Act."

Appellants' Point V (Br. 86-94) is set forth on page 86 of their brief, as follows:

> "The Act perforce the requirements of the Oath denied appellants liberty without due process of law, in violation of the Fourteenth Amendment, by forfeiting contracts of employment and by denying payment of accrued compensation thereunder, because appellants failed to take the Oath when such failure was due to a serious and reasonable doubt as to its meaning."

Appellants' Point VI (Br. 94-108) is set forth on page 94 of their brief, as follows:

> "The Act perforce the requirements of the Oath impaired the obligation of contracts, contrary to Article 1, Section 10 of the Constitution of the United States, in that the statutory forfeiture of said contract and the denial of the accrued compensation thereunder is effected by an unreasonable exercise of the reserved protective power of the State."

The above points are either *directly* or *indirectly* discussed in "Proposition 6" (pp. 33-41) of the brief of The Board of Regents, *et al.*, in the Supreme Court of Oklahoma, as follows:

> "Is a person (such as a public school or college teacher, instructor or employee) holding a contract of employment for a fixed period ending on or prior to the expiration of the current fiscal year, to-wit: prior to June 30, 1951, which contract was lawfully entered into before April 9, 1951, the effective date of the Act, who fails to take the oath as prescribed in the Act, prevented by reason of said failure from being paid compensation and/or expenses earned or incurred by him under the provisions of said contract?

"In relation to the above proposition attention is called to Section 15, Article 2 (Bill of Rights) of our State Constitution, the material part thereof being as follows:

> 'No * * * law impairing the obligation of contracts shall ever be passed. * * *'

"It is clear that House Bill No. 8, *as applied to a contract such as is considered here*, violates the above constitutional provision, *that is*, unless such application is valid under the police power of the State. While plaintiff takes the position that the Act, as so applied, is valid under said police power, many citizens of the State (including intervenors) do not, and hence we respectfully ask the Court to give its opinion thereon.

"The position of the Attorney General as to Proposition '6', *supra*, is set forth in his opinion as follows:

> '6. As to a person holding a *contract of employment for a fixed period ending on or*

prior to the expiration of the current fiscal year, to-wit: prior to June 30, 1951, which contract was lawfully entered into *before April 9, 1951*, the effective date of the Act, the Attorney General is of the opinion that under that part of Section 15, Article 2 of our State Constitution, which provides that no law

> "impairing the obligation of contracts shall ever be passed,",

the failure of said person to take the oath as prescribed in the Act will not prevent him from being paid his compensation and/or expenses as provided therein. *However, as to such a contract entered into after April 9, 1951, including a contract of employment for a future fiscal year, the converse of the above rule would be true.* Moreover, the salary or emoluments of a public officer coming within the purview of Section 10, Article 23 of our State Constitution, should be paid to him, notwithstanding his failure to timely take the oath.'

* * * * *

"Attention is also called to the case of *State ex rel. Roth, Trustee* v. *Waterfield*, 167 Okl. 209, 29 P. 2d 24, wherein the first, second and fifth paragraphs of the syllabus are as follows:

> '1. The police power is an attribute of sovereignty possessed by every sovereign state and is inherent in States of the American Union. While incapable of exact definition, *it is not without its limitation* and must be exercised in a manner consistent with constitutional requirements *both State and national.*
>
> '2. In order to be justified as a proper exercise of the police power, a legislative

enactment must be neither unreasonable, capricious, nor arbitrary, *and it must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion.*

'5. Senate Bill No. 76 of the 14th Legislature, commonly known as the "Moratorium Law" (Session Laws 1933, Chapter 16, page 42), examined with a view of determining whether it constitutes a proper exercise of the *police power* of the State, held, that Section (1) thereof and each provision of that section is invalid and unconstitutional *for the reason that it arbitrarily delays mortgage foreclosure actions without adequate provisions for compensation to the mortgagee, and without any provision for protection of the rights of the mortgagee during the period of delay;* that such section likewise goes beyond the reasonable demands of the occasion, being applicable according to its terms to all classes of mortgage foreclosures *without regard to the merits of the particular case,* and that such section also violates Section 6 of Art. 2 of the Constitution of the State of Oklahoma, providing that courts shall be open at all times and speedy remedies afforded for every wrong. Sections 2, 3 and 4 of said Act held valid as a reasonable exercise of the police power of the State in so far as such sections vest in the trial courts a judicial discretion to grant continuances in proper cases, *upon conditions protecting the rights of the mortgagee, and providing compensation for the delay thus afforded.*'

"In the body of the opinion of the *Waterfield case, supra,* it is stated:

'The plaintiff asserts that the remaining sections of the Act, and especially Paragraph 2 of Section 1 of the Act, violate the provisions of our Constitutions, State and national, relating to *"impairment of the obligations of contract,"* or equal protection of the laws.

'The defendant, while denying that these constitutional provisions are violated, *urges* that even though offensive to constitutional *requirements, the Act should be upheld as a fair and reasonable exercise of the police power. The contention of the defendant is that the entire Act is justified without restrictive interpretation* on the theory that in view of existing economic conditions, *it is a just and reasonable exercise of the police powers of the sovereign State.* This view embraces the idea that the power, when reasonably exercised by appropriate legislation, *is not restricted by constitutional limitations*, and may infringe upon rights guaranteed to citizens by specific provisions of our fundamental and basic law. *A view is thus expressed which, pursued to its ultimate conclusions, vests in the Legislature the power, in emergency cases, to suspend the Constitution to the extent that that basic document appears to unreasonably restrict their power to legislate.* It makes the Legislature the judge, in the first instance, of when such an emergency exists and to what extent it may reasonably go in suspending or overriding constitutional inhibitions.

'This seems to be an extremely dangerous doctrine fraught with possibilities which may undermine the very foundation of American democracy.

* * * * *

'When the exercise of the police power affects existing contracts, *how is it to be reconciled* with the clauses in the Federal and State Constitutions prohibiting the impairment of the obligation of contracts? Section 15 of Art. 2 of our State Constitution provides:

> "No bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be passed."

'Likewise Section Ten. (10) of Art. One (1) of the Constitution of the United States contains the following:

> "*No State shall* * * * *pass any* bill of attainder, *ex post facto law, or law impairing the obligation of contracts*, or grant any title of nobility."

* * * * *

'With few exceptions its use (State's police power) has been confined to legislation directly and ostensibly relating to public health, safety, and welfare, *and the effect of such legislation upon existing contracts was only incidental.*

'There is a vast difference and a vivid distinction between a police regulation enacted for the obvious purpose of preserving peace, health, or safety, which *incidentally* affects contracts or property rights on the one hand, and, on the other hand, a law which is *directly intended* to change or alter contractual relations between individuals in connection with contracts of a class which have never been regarded as affecting the public peace or safety and morals of the

community, in the hope that the change of such contractual relations may incidentally improve the economic welfare of the community.

* * * * *

'As stated by the Supreme Court of the United States in the case of *Holden* v. *Hardy*, 169 U.S. 366, 42 L. ed. 780:

> "Recognizing the difficulty in defining, with exactness, the phrase, 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the State, *without compensation;* and that no one shall be condemned in his person or property *without an opportunity of being heard in his own defense.*"

'And again in the case of *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, Mr. Justice Brewer said:

> "The equal protection of the laws, which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, *in whatever form it may be enacted*, by which the property of one individual is, without compensation, wrested from him for the benefit of another, *or for the public.*"

'Likewise the provisions of Section 1 have the practical effect of overriding Sec-

tion 6 of Article 2 of our State Constitution, which provides:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation, and right and justice shall be administered *without sale, denial,* delay, or prejudice."

"In the opinion of the court 'On Rehearing' in the *Waterfield case, supra,* the decision of Justice Hughes in the case of *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398, 78 L. ed. 413, was cited with approval as holding that

> 'Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.'

"In the case of *Dobbins* v. *Los Angeles,* 195 U.S. 223, 49 L. ed. 169, the Supreme Court of the United States, at Page 237 of the U. S. citation, quoted with approval from the case of *Connolly* v. *Union Sewer Pipe Co.,* 184 U.S. 540, 588, as follows:

> 'But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the States to the contrary notwithstanding, a statute of a State, *even when avowedly enacted in the exercise of its police powers,* must yield to that law. No right granted or secured by the Constitution of the

> United States can be impaired or destroyed by a State enactment, *whatever may be the source from which the power to pass such enactment may have been derived.* "The nullity of any Act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.'

"In 56 C.J., page 382, § 303, under the subject, 'Schools and School Districts,' it is stated:

> 'A teacher, who has been appointed to the position and accepted it, from the time of his acceptance *stands in a contract relation* as distinguished from the tenure or holding of a public officer. He holds his position by contract and not at the will of the sovereign power. * * *'

"In the case of *Hall* v. *Wisconsin*, 103 U.S. 5, the editorial headnote is as follows:

> 'A contract between a State and a party, *whereby he is to perform certain duties for a specific period at a stipulated compensation*, is within the protection of the Constitution; and on his executing it he is entitled to that compensation, although before the expiration of the period the State *repealed the statute* pursuant to which the contract was made.'

"In the case of *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 595, 82 L. ed. 685, the 4th editorial headnote is as follows:

> 'Although the principal function of a legislative body is not to make contracts but to make laws which declare the policy of the State and are subject to repeal when a subsequent Legislature shall determine to alter that policy, a legislative enactment may contain provisions which, when accepted as a basis of action by individuals, become contracts between them and the State or its subdivisions, *within the protection of the provisions of the Federal Constitution forbidding the impairment of contracts by State action.*'

"Before concluding our argument as to Proposition '6', *supra*, defendants again desire the court to consider the * * * above-cited cases; and to hold that the Act, as applied to the contracts involved in Proposition '6' goes 'beyond the *reasonable demands* of the occasion' within the meaning of the second paragraph of the syllabus * * * of the *Waterfield case, supra.*

"In this connection we ask the court to note that the Act requires a person (as here) holding a definite contract for a fixed period expiring during the fiscal year ending June 30, 1951, in order to serve and draw compensation during the last few weeks of his contract, to take an oath which, among other things, *requires him to swear:*

> (1) That he will 'take up arms' etc., even though he may have *religious scruples* against bearing arms. The theory that he is not bound by said oath to bear arms but may in lieu thereof render non-combatant service and hence can properly sign the oath with mental reservations (the trial court did not permit written reservations), *is at best, a debatable theory;* and

(2) that he is 'not affiliated, directly or indirectly, * * * with any foreign * * * government,' although he may be a *citizen of another country* but lawfully in the United States. The theory that he is not bound by said oath and is not disloyal to his native land in taking the same, with or without a written statement attached thereto, * * * as permitted by the trial court herein, *is likewise, at best, a debatable theory.*

"Suffice to say that most any good and loyal American, who might be doing 'exchange' teaching or professional or research work in a foreign country, would hesitate, and probably would refuse without hesitation, *to sign any such required oath of allegiance* demanded by such foreign country as a prerequisite to receiving pay for the remainder of his contract, valid when entered into, and mutually observed until near its expiration."

ANSWER TO APPELLANTS' POINTS III AND IV

Appellants' Point III (Br. 66-77) is set forth on page 66 of their brief, as follows:

"The Act, as applied to appellants, Lee, Correll, Baum, Schmoe and Nietz, each of whom sincerely believes that bearing arms against one's fellow man is contrary to divine law, by requiring each of them to promise under oath to bear arms, denies each named appellant his liberty without due process of law, contrary to the Fourteenth Amendment; because as to the named appellants, the Act is a law respecting the free exercise of religion."

Appellants' Point IV (Br. 77-85) is set forth on page 77 of their brief, as follows:

> "The Act perforce the requirements of the Oath as applied to Lee, Correll, Baum, Schmoe and Nietz, in requiring each of them to take an oath to bear arms, when each holds sincere religious convictions contrary thereto, constitutes an unconstitutional interference with the exclusive powers of the Congress to raise and support armies and provide and maintain a navy, under Article 1, Section 8 of the Constitution of the United States, when antecedently to the passage of the Act, the Congress, by law, had exempted such persons from the duty to bear arms."

The above points are either *directly* or *indirectly* discussed in "Proposition 3" (pp. 20-23) of the brief of The Board of Regents, *et al.*, in the Supreme Court of Oklahoma, as follows:

> "Does the Act require public officers and employees having religious scruples against bearing arms to take the oath in the exact form set forth in Section 2 thereof, or will the Act be substantially complied with if such officers or employees modify the oath, either in its body or by appending words thereto, in effect stating that in lieu of bearing arms they will render non-combatant service?
>
> "The Act makes no exception as to public officers or employees such as are above mentioned, and hence under a literal interpretation of the Act the oath taken thereby cannot be modified by use of either of the methods above set forth. While plaintiff takes the first position above presented and not the second, many citizens of the State (including intervenors)

do not, and hence defendants respectfully ask the court to give its opinion thereon.

"In this connection it will be noted that in the instant case (C.-M. 238 to 246) the trial court [R. 51-58] in effect held:

(1) That the oath could not be modified by use of either of the methods above set forth, and

(2) that if an oath is so modified by persons having religious scruples against bearing arms but not informed that such provisions in their oath were not constitutionally binding thereon, said persons (other than those who intervened herein)—see Paragraph 6 of the court's conclusions of law (C.-M. 240) as well as persons who for the lack of such information failed to take the oath, after being so informed and if the Board of Regents find that said failure or modification was due to an 'honest mistake,' could thereafter (no time limit was fixed) be reinstated by taking an unmodified oath.

"In the recent case of *Allen Smith* v. *Charles Smith, Superintendent of the Central State Hospital*, No. 16185, District Court, Cleveland County, the trial court on May 23, 1951, held (no appeal was taken) in conformity with holding No. '(1)', *supra*, and in relation to a situation such as is presented in holding No. '(2)', *supra*, held (also without fixing a time limit) that the plaintiff in said case was

> 'entitled to reinstatement by his subscribing to the oath in its entirety as set forth in House Bill No. 8 * * *.'

"The position of the Attorney General as to Proposition '3', *supra*, is set forth in his opinion as follows:

'3. In relation to that part of the oath which requires public officers or employees to state

> "that I will take up arms in the defense of the United States in time of war or National Emergency, if necessary,"

attention is called to the case of *Girouard v. United States* (1946), 328 U.S. 61, 90 L. ed. 1084, in which the Supreme Court of the United States *expressly overruled* three of its former decisions holding that the statutory oath of allegiance taken by aliens in effect required them to state in their applications for citizenship that they would "bear arms" in time of war, and in effect held (in harmony with dissenting opinions filed in said former cases of Chief Justice Hughes and Justice Holmes) that said oath of allegiance, when properly construed, did not so require. In support of said holding the court on pages 65, 66 and 68 of the U.S. citation, used the following language:

> "Petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices. While Article VI, Clause 3 of the Constitution provides that such officials, both of the United States and the several States, 'shall be bound by Oath or Affirmation, to support this Constitution,' it significantly adds that *'no religious Test shall ever be required as a Qualification to any Office of Public Trust under the United States.'*
>
> "As Mr. Chief Justice Hughes pointed out (*United States* v.

> *MacIntosh, supra* [283 U.S.] p. 633), *religious scruples against bearing arms* have been recognized by Congress in the various draft laws. * * * Congress has thus recognized that one may adequately discharge his obligations as a citizen *by rendering* non-combatant service. * * *
>
> "Mr. Justice Holmes stated in the *Schwimmer case* (279 U.S. pp. 654-55): * * * The victory for freedom of thought *recorded in our Bill of Rights* recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. *Freedom of religion* guaranteed by the First Amendment is the product of that struggle."

'Attention is also called to the 12th and 13th paragraphs of the syllabus of *Ex parte Walrod* (1941), 73 Okl. Cr. 299, 120 P. 2d 783, and to the fact that the above-quoted provision of Clause 3, Article 6 of our Federal Constitution is almost identical to that part of Section 2, Article 1 of our State Constitution which provides

> "no religious test shall be required for the exercise of civil or political rights."

'The Attorney General is, therefore, of the opinion that while the provisions of the oath which require public officers and employees to state

> "that I will take up arms in the defense of the United States in time of War or National Emergency, if necessary,"

are not unconstitutional, *same cannot constitutionally be applied to a person who has religious scruples against bearing arms,* and hence is of the further opinion that as to such person said statement in his oath is of no force or effect and is not binding thereon. In fact, the above concluding words "if necessary," construed in connection with federal laws permitting persons having religious scruples against bearing arms to render non-combatant service in lieu of bearing arms, in our opinion, indicates a legislative intent that such a person taking the new oath agrees to either bear arms or render non-combatant service.' "

CONCLUSION

WHEREFORE, premises considered, The Board of Regents, *et al.*, respectfully submit to this Court, for its consideration, the issues involved in this appeal without further comment or argument.

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OCTOBER, 1952.